Main Document Page 1 of 30 1 2 FILED & ENTERED 3 4 AUG 09 2019 5 **CLERK U.S. BANKRUPTCY COURT Central District of California** 6 **DEPUTY CLERK** BY tatum 7 NOT FOR PUBLICATION 8 UNITED STATES BANKRUPTCY COURT 9 CENTRAL DISTRICT OF CALIFORNIA 10 11 LOS ANGELES DIVISION 12 In re: No. 2:15-bk-10768-RK 13 BRIAN J. COOK and VICTORIA Chapter 7 VELASQUEZ COOK, 14 Adv. No. 2:15-ap-01323-RK 15 Debtors. FINDINGS OF FACT AND CONCLUSIONS 16 OF LAW AFTER TRIAL ON COMPLAINT FOR NONDISCHARGEABILITY OF DEBT **EDWARD FRANOWICZ and** 17 PURSUANT TO 11 U.S.C. § 523(a)(2) LARISSA GALLAGHER. 18 January 31, 2019 DATE: Plaintiffs. 19 TIME: 9:00 a.m. PLACE: Courtroom 1675 VS. 20 Roybal Federal Building 255 East Temple Street BRIAN J. COOK, 21 Los Angeles, CA 90012 22 Defendant. 23 I. INTRODUCTION 24

This adversary proceeding came on for trial before the undersigned United States
Bankruptcy Judge on January 31, 2019 on the Complaint for Nondischargeability of Debt
Pursuant to 11 U.S.C. § 523(a)(2)(A) ("Complaint") of Plaintiffs Edward Franowicz
("Franowicz") and Larissa Gallagher ("Gallagher," and, collectively with Franowicz, "Plaintiffs"),

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Electronic Case Filing Number ("ECF") 1, filed on June 19, 2015. James Andrew Hinds, Jr. and Rachel M. Sposato of the law firm of Hinds & Shankman, LLP appeared for Plaintiffs. No appearance was made by or on behalf of Defendant and Debtor Brian J. Cook ("Cook," "Defendant," or "Debtor").

By the Complaint, Plaintiffs seek a Judgment against Cook pursuant to 11 U.S.C. § 523(a)(2)(A) on the basis that Cook defrauded them as to the contract for sale of the real property commonly known as 40 Hermosa Avenue, City of Hermosa Beach, County of Los Angeles, State of California 90254 ("Subject Property") entered into by Franowicz and Cook.

At trial, the court received into evidence Plaintiffs' testimony in their trial declarations and other evidence offered by them, and the court had granted two of Plaintiffs' Motions in Limine. On February 1, 2019, the court entered an order (1) admitting the trial declarations of Plaintiffs, Robert Griswold, and Eric Fonoimoana; (2) admitting transcripts of Cook's depositions and the 11 U.S.C. § 341(a) meeting of creditors in this bankruptcy case; and (3) setting a post-trial briefing schedule. ECF 122. This order provided that Cook could file and serve any objections to Plaintiff's post-trial brief and/or lodge his own proposed findings of fact and conclusions of law on or before March 20, 2019. *Id.* On February 15, 2019, Plaintiffs filed and served a post-trial brief, ECF 126, and lodged and served their proposed findings of fact and conclusions of law, ECF 127. Cook did not file any post-trial brief and did not lodge any proposed findings of fact and conclusions of law by the deadline of March 20, 2019 or at any other time.

Having considered the evidence received at trial, the other papers and pleadings relating to this matter, the court hereby issues the following findings of fact and conclusions of law in this adversary proceeding pursuant to Federal Rule of Civil Procedure 52, made applicable here by Federal Rule of Bankruptcy Procedure 7052.

#### II. FINDINGS OF FACT

1. Plaintiffs are and were at all times relevant hereto residents of the State of California. JPTS  $\P$  1.1

Throughout these Findings of Fact and Conclusions of Law references will be made to the Joint Pretrial Stipulation ("JPTS") [ECF 97], the Trial Declaration of Edward Franowicz ("Franowicz Dec.") [ECF 111], the Trial

JPTS ¶ 2.

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3. Fee title in the Subject Property was at all times relevant hereto vested as "Brian J. Cook, a Single Man." JPTS ¶ 4.

Cook is and was at all times relevant hereto a resident of the State of California.

- 4. Cook's wife and co-debtor, Victoria Velasquez Cook, was initially a defendant in this adversary proceeding, but she was dismissed as a party to this adversary proceeding pursuant to an order approving her dismissal from the adversary proceeding. *Order Approving Stipulation for the Dismissal of Victoria Cook from Action*, ECF 43, filed and entered on May 31, 2017.
- 5. On or about December 5, 2007, Cook obtained a home loan for the Subject Property from Washington Mutual Bank ("WAMU") in the amount of \$1,084,000.00. WAMU then recorded a Deed of Trust with the Los Angeles County Recorder on or about January 14, 2008, Instrument Number: 20080071716. JPTS ¶ 6; WAMU Deed of Trust, Trial Exhibit 133. The Loan was assigned to JPMorgan Chase Bank ("Chase Bank") as successor to WAMU. Franowicz Dec. ¶ 14.
- 6. On or about August 15, 2007, Cook obtained a loan from Evergreen Private Bank ("Evergreen") in the amount of \$309,800.00, which was secured by a deed of trust against the Subject Property, which was recorded with the Los Angeles County Recorder as Instrument Number 20071965408. JPTS ¶ 7.
- 7. On or about October 21, 2011, Cook executed a Deed of Trust in favor of Century West Financial Corp. ("Century West") in the amount of \$100,000.00 for an alleged loan, which was secured against the Subject Property, and which was then recorded with the Los Angeles County Recorder as Instrument Number 20111567182 on or about November 18, 2011 ("Century West Lien"). JPTS ¶ 8; Recorded Short Form Deed of Trust and Assignment of Rents Between Cook and Century West Financial Corp., Trial Exhibit 6.

Declaration of Larissa Gallagher ("Gallagher Dec.") [ECF 110], the Trial Declaration of Robert S. Griswold ("Griswold Dec.") [ECF 112], the Trial Declaration of Eric Fonoimoana ("Fonoimoana Dec.") [ECF 113], and the marked deposition transcripts of Brian J. Cook [ECF 114]. The Joint Pretrial Stipulation was unilaterally filed by Plaintiffs on September 25, 2018, and was approved by the court by order filed and entered on October 5, 2018 [ECF 100] after the court conducted the pretrial conference on October 2, 2018 at which counsel appeared for Plaintiffs and Cook appeared for himself.

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- 8. As of March 1, 2012, the outstanding balance on the loan owed to Chase Bank was \$1,074,450.23. JPTS ¶ 12; Chase Mortgage Loan Statement from March 1, 2012, Trial Exhibit 14.
- 9. As of March 1, 2012, the outstanding balance on the alleged loan by Century West was \$100,000.00. JPTS ¶ 12.
- 10. On or about March 1, 2012, Cook as seller executed a California Residential Purchase Agreement and Joint Escrow Instructions ("Sales Contract") and a Residential Lease or Month-To-Month Rental Agreement ("Lease Agreement") with Franowicz as buyer of the Subject Property. JPTS ¶ 11; Sales Contract, Trial Exhibit 3; Lease Agreement, Trial Exhibit 5. In addition, Cook signed an Option Agreement ("Option Agreement") which gave Franowicz the option to buy the Subject Property for \$1.16 million. Option Agreement, Trial Exhibit 4. Franowicz paid Cook \$20,000 as consideration for the option which was to be held open from April 1, 2012 through December 31, 2012. Id. Plaintiff Gallagher was not a signatory to any of these three agreements (the Sales Contract, the Lease Agreement, and the Option Agreement). Sales Contract, Trial Exhibit 3; Option Agreement, Trial Exhibit 4; Lease Agreement, Trial Exhibit 5.
- Franowicz's real estate broker for the purchase and sale of the Subject Property was Eric Fonoimoana ("Fonoimoana"). JPTS ¶ 12; Fonoimoana Dec. ¶¶ 2-4.
- 12. Cook's real estate broker for the purchase and sale of the Subject Property was Alexandra North ("North"). JPTS ¶ 14.
- 13. In addition to North, Cook's real estate brokerage team working on the sale of the Subject Property included Ron Hacker ("Hacker") and Laura Mize ("Mize"). Cook testified that North, Hacker and Mize were all his agents regarding efforts to sell and lease the Subject Property. Cook Deposition dated July 26, 2016, page:line(s) 20:25, 21:1-4, 41:15-24.
- 14. The Sales Contract provided that the purchase price for the Subject Property was \$1,160,000.00. JPTS ¶ 15.

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- The Sales Contract provided for an original escrow closing date of December 1, 2012 and further provided that the escrow closing date could be extended by four weeks by written request. JPTS ¶ 18; Sales Contract, Trial Exhibit 3.
- The Option Agreement, Lease Agreement, and the Sales Contract all contain attorney's fees provisions. Sales Contract, Trial Exhibit 3; Option Agreement, Trial Exhibit 4; Lease Agreement, Trial Exhibit 5.
- An Addendum to the Sales Contract dated March 1, 2012, and signed by Cook and Fonoimonana on behalf of Franowicz on March 9, 2012 provided as follows:
  - 1. \$34,800.00 to be wired into escrow by April 15, 2012 if Buyer removes all of his contingencies. Advanced release of funds: From the \$34,800.00 escrow holder is irrevocably authorized to pay to Seller the Non-Refundable sum of \$20,000 from which funds deposited by Buyer, provided said funds have been cleared by the Bank on which they were drawn and Escrow holder is in receipt of mutually executed Escrow instructions and the Purchase Agreement and Joint Escrow Instructions signed by Buyer and Seller. . . .
  - 2. Once the contingencies are removed by April 15, 2012 or sooner Buyer will be responsible for maintaining the appliances, minor repairs until escrow closes. Landlord/Seller will maintain major items plumbing, electrical, roof etc. as long as it is of no fault of the Tenant/Buyer, Property will be sold in as-is condition.
- JPTS ¶ 20; *Sales Contract,* Trial Exhibit 3.
- 18. As of March 1, 2012, the total amount of the liens against the Subject Property was approximately \$1,174,450.23, which is greater than the purchase price of \$1,160,000.00 set forth in the Sales Contract. Franowicz Dec. at ¶¶ 46-47; Recorded Short Form Deed of Trust and Assignment of Rents Between Cook and Century West Financial Corp., Trial Exhibit 6; Chase Mortgage Loan Statement from March 1, 2012, Trial Exhibit 14.
- Cook and his agents failed to disclose to Franowicz that the Subject Property was further encumbered by a second trust deed in favor of Century West in the amount of

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- The court finds that as of March 1, 2012, when Cook executed the Sales Contract, 20. Option Agreement, and Lease Agreement with Franowicz, and thereafter through December 2012, Cook and his agents willfully withheld from Franowicz the fact known to them that the Subject Property was encumbered by secured debt exceeding the Sales Contract purchase price of \$1,160,000.00, thus making the agreed-to purchase price impossible to effectuate a closing. Paragraphs 5-19, *supra;* Franowicz Dec. at ¶¶ 46-55.
- 21. Cook and his agents were aware of the \$100,000.00 Century West lien prior to execution of the Sales Contract, Option Agreement, and Lease Agreement with Franowicz. Cook Deposition Transcript, July 26, 2016 at 37-38. Because the outstanding balance of the amount owed on the liens secured against the property was greater than the purchase price in the Sales Contract, the court finds that this is further evidence that Cook could not have properly intended to sell the Subject Property for the agreed-upon purchase price set forth in the Sales Contract between him and Franowicz.
- 22. Pursuant to the terms of the Lease Agreement, Franowicz wired \$11,166.62 to Cook's agent on March 5, 2012. JPTS ¶ 17; Wire Out for Initial Deposit Under Lease Agreement, Trial Exhibit 292.
- 23. Pursuant to the terms of the Lease Agreement, Franowicz took possession of the Subject Property, and he and Gallagher moved into the Subject Property on or about March 25, 2012, and they continued to be in possession of the Subject Property through the trial date. JPTS ¶ 16.
- 24. Plaintiffs began making monthly rental payments to Cook in the amount of \$5,000 per month. JPTS ¶ 22; Rent Checks from Plaintiffs, Trial Exhibit 288.
- 25. At the instruction of Cook's agents, Hacker and Mize, Plaintiffs began sending their rental payments to "Brian Cook/Bag Fund." Instructions for Disbursement of Funds Held by Mara Escrow, Trial Exhibit 78; Gallagher Dec. at ¶¶ 8 and 11.

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- 26. On April 13, 2012, Linda Drumm of Mara Escrow ("Drumm") informed Franowicz that there was approximately \$20,000.00 of equity in the Subject Property and that North would take a cut in her sales commission if the equity amount fell below \$20,000.00. JPTS ¶ 19; Email correspondence between Drumm and Fonoimoana, Trial Exhibit 8.
- 27. On or about April 16, 2012, Franowicz deposited \$34,800.00 into escrow on the Sales Contract. JPTS ¶ 21; Franowicz Dec. at ¶ 9; Escrow Trust Receipt from Mara Escrow, Trial Exhibit 12.
- 28. Of the money deposited into the escrow by Franowicz, \$20,000.00 was issued to Bag Fund, LLC. Cook signed the "Instructions for Disbursement of Proceeds," dated April 25, 2012 that directed the \$20,000.00 be issued to Bag Fund, LLC. JPTS ¶ 52; Franowicz Dec. at ¶ 9; Instructions for Disbursement of Funds Held by Mara Escrow, Trial Exhibit 78; Rent Checks from Plaintiffs, Trial Exhibit 288.
- 29. Unbeknownst to Franowicz, Cook and his team had been secretly negotiating with a third party, Ben Schneider ("Schneider"), for the sale of the Subject Property. Franowicz Dec. at ¶ 23; Sales Contract and Short Sale Addendum between Ben Schneider and Brian Cook, Trial Exhibit 65; Letter from Chase Bank Approving Short Sale, Trial Exhibit 180.
- 30. On or about July 10, 2012, while escrow was still pending with Franowicz on the Sales Contract, Cook entered into a purchase and sale agreement with Schneider for the Subject Property for a purchase price of \$950,000.00. JPTS ¶ 23; Sales Contract and Short Sale Addendum between Ben Schneider and Brian Cook, Trial Exhibit 65. Franowicz was unaware of the Schneider Purchase and Sale Agreement until discovery was conducted as part of this bankruptcy 11 case. Franowicz Dec. at ¶ 23.
- 31. On or about October 3, 2012, Chase Bank issued a letter addressed to Cook at 40 Hermosa Avenue, agreeing to a "short sale" of the Chase mortgage lien "only for the contract sale price of \$1,000.000.00 between Ben Schneider (the 'Buyer'), and the Seller." JPTS ¶ 32; Letter from Chase to Brian Cook, Trial Exhibit 64.
- 32. Cook and his agents sought to sell the Subject Property to Schneider at the same time that the existing Sales Contract and Option Agreement with Franowicz was in effect.

Sales Contract and Short Sale Addendum between Ben Schneider and Brian Cook. Trial

Exhibit 65.

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- 33. Starting in or about August 2012, Cook ceased making regular home loan payments to Chase Bank, the then-holder of the underlying first lien on the Subject Property, and Cook made no further payments on the first lien after August 2012. JPTS ¶ 24.
- 34. Starting in or about August 2012, Cook ceased making regular payments to the Homeowners' Association for the Subject Property, and he made no further payments to the Homeowners' Association after August 2012. JPTS ¶ 25.
- 35. On August 30, 2012, escrow agent Drumm circulated an updated Preliminary Title Report for the Subject Property, and that Preliminary Title Report, dated August 29, 2012, did not disclose the existence of the \$100,000.00 Century West second lien on the Subject Property. JPTS ¶ 26; Preliminary Title Report Dated August 29, 2012, Trial Exhibit 138.
  - 36. On September 20, 2012, Mize sent a letter via e-mail to Fonoimoana stating:

Hi Eric: I'm writing you on behalf of my client, Brian Cook, in reference to the above-referenced purchase/sale of the Property to your client. Have you approved the preliminary title report yet? And if so, which one? There is some confusion surrounding the Preliminary Title Report which needs to be addressed. There was a second deed of trust for \$100,000 ("Deed"), recorded on the Property on November 18, 2011, which still needs to be resolved. It was recorded before your clients moved into the Property and we assumed you were awre [sic] of that Deed. Originally, the hoder [sic] of the Deed had agreed to release the lien for a nominal amount, but have come to realize that they won't settle for less than the full amount. So we need time to deal with this. That is why your decision to unilaterally notice the closing date without contacting us is a problem. Our client believed that the Residential Purchase Agreement and Joint Escrow Instructions gave either party the right to close by December 3, 2012....

- JPTS ¶ 28; Email from Mize to Fonoimoana. North. and Hacker from September 20. 2012 ("September 20 e-mail"), Trial Exhibit 30.
- 37. Receipt of the September 20 e-mail was the first time that Franowicz learned of a second deed of trust for \$100,000 in favor of Century West or that Cook had been in negotiations with Century West to release the lien for a nominal amount. Franowicz Dec. at ¶¶ 17-19; Email from Mize to Fonoimoana, North, and Hacker from September 20, 2012, Trial Exhibit 30.

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- 38. Prior to September 20, 2012, Cook and his team withheld the existence of the Century West Lien from Franowicz. Franowicz Dec. at ¶¶ 17-19; Fonoimoana Dec. at ¶¶ 16-18. As Franowicz testified at trial, he would not have entered into the Sale Agreement if Cook had disclosed the existence of the Century West Lien. Franowicz Dec. at ¶ 19.
- 39. On October 1, 2012, the escrow company sent Fonoimoana and Francowicz a copy of a second Preliminary Title Report dated October 1, 2012, which again did not disclose the existence of the \$100,000.00 Century West second lien on the Subject Property. *Preliminary* Title Report Dated October 1, 2012, Trial Exhibit 140; JPTS ¶ 27; Fonoimana Dec. at ¶¶ 18-20.
- 40. On October 4, 2012, escrow officer Drumm sent an email to Fonoimoana and North saying: "The Preliminary Reports you have received up to this point have always reported 1 Trust Deed the Seller has secured against the property. For approximately the last 45 days we have been asking title to search again to disclosure a \$100,000 2nd – which eluded Title until now. Orange Coast Title has now identified the \$100,000 as being a valid Trust Deed attaching to this property and is now included in the attached Prelim." JPTS ¶ 29.
- 41. On October 11, 2012, Fonoimoana e-mailed North and stated, among other things: "My client made an offer on a standard sale, it was actually a short sale. The sellers did not disclose this info to us until Thursday Sept. 20, 2012 via email." JPTS ¶ 33; Email from Fonoimoana to North, Trial Exhibit 79.
- 42. On October 11, 2012, Fonoimoana sent an e-mail to North stating, among other things: "My client released funds to Brian Cook, (\$20k) because according to the Prelim and the info from Escrow there would be enough money and a little extra to pay for all of Brian Cook's liens or debts related to 40 Hermosa Ave Hermosa Beach, CA 90254." JPTS ¶ 31.
- 43. On or about October 12, 2012, Mize forwarded an e-mail written by Cook with the subject line, "Send this out Ron if you would like..." to Fonoimoana, which stated: "Hello Eric, Ron and Laura very much represent me... They do not have a power of attorney letter because I have not and will never give them power of attorney.. That has nothing to do with the selling of 40 hermosa." JPTS ¶ 34; Email from Mize To Fonoimoana Forwarding Message from Cook, Trial Exhibit 68.

- 44. The Franowicz offer to purchase the Subject Property was based on a standard sale and not a "short sale," and at no time prior to the execution of the Sales Contract did Cook's team advise Franowicz that the sale of the Subject Property would require a "short sale." Franowicz Dec. at ¶ 14.
- 45. On October 29, 2012, Hacker sent an email to Franowicz, copying North and Bonnie Aletaha, stating, in part: "Alex [North] will be sending you a purchase contract for 200k less. Or 960k. It's a long shot. But please sign it and forward it to bonnie. If bank approves it, we can discuss the alternative options." JPTS ¶ 35.
- 46. Thus, without Franowicz's consent, Cook and his team were seeking to convince Chase Bank to approve a short sale of the Subject Property. Franowicz Dec. at ¶¶ 14, 22, 23, 51; Sales Contract and Short Sale Addendum between Ben Schneider and Brian Cook, Trial Exhibit 65; California Residential Purchase Agreement and Joint Escrow Instructions, Trial Exhibit 77; Letter from Chase Bank Approving Short Sale, Trial Exhibit 180; Email Chain Between Hacker, Franowicz, etc., Trial Exhibit 193.
- 47. On or about November 1, 2012, Franowicz and Fonoimoana submitted a written request to extend the escrow closing date on the Sales Contract by four weeks, moving the escrow closing date to December 28, 2012. JPTS ¶ 36; *Addendum to Sales Contract*, Trial Exhibit 55.
- 48. On November 13, 2012, Chase Bank issued a letter addressed to Cook at 40 Hermosa Avenue saying that it was cancelling the request for a short sale because the buyer could not get financing approval for the transaction. JPTS ¶ 37.
- 49. On December 14, 2012, Franowicz received loan approval for his purchase of the Subject Property from Malaga Bank. Franowicz Dec. at ¶¶ 25-27; Franowicz Loan Approval from Malaga Bank, Trial Exhibit 57. With loan approval from Malaga Bank for his purchase of the Subject Property, Franowicz was ready, willing, and able to close escrow on the Subject Property. *Id.*
- 50. On December 14, 2012, Mize e-mailed Fonoimoana, with North, Hacker, and Franowicz carbon copied, stating: "Hi Eric, We heard from Alex that your client received loan

- 51. On or about December 17, 2012, Fonoimoana sent an email to North, stating: "Good morning Alex, I believe Escrow should have the loan docs arriving today. Larissa will sign the loan docs soon thereafter. Due to the Holidays and The buyer's desire to close as soon as possible, we would like to close this week. Please arrange with the seller to have him do his part. The goal would be to fund Wednesday and record Thursday." JPTS ¶ 41; *Email* from Fonoimoana to North, Franowicz, Drumm, and Gallagher, Trial Exhibit 60.
- 52. On or about December 18, 2012, Mize sent an e-mail to Franowicz, with Hacker, North, Fonoimoana, Cook, and Mara Escrow carbon copied, stating:

Dear Mr. Franowicz:

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Congratulations on finally getting loan approval! Brian and I just found out you received a formal loan commitment on the 14<sup>th</sup> and that you were planning to close on the 21st, this upcoming Friday. Brian and his business manager, Ron, was a little surprised that you are attempting to close then because they thought you had an understanding between both sides that either side, when finally ready to close, would give at least 14 days' notice of any closing. Please advise if we are authorized to contact Malaga Bank to verify this commitment. Nevertheless, there is no way that Brian will be able to close by then. He would like to close by the end of the year, especially since the holidays are upon us, that seems almost impossible. Brian and escrow still need payoff demands for both loans. Even if escrow sent out these requests today, this can take 3 seeks as fo [sic] lenders under California Civil Code Section 2943, and are required to respond within 21 days. While it can happen sooner, it is unlikely during this time of year. Unfortunately, since entering into the lease option agreement, Brian's situation has drastically changed. He lost his job and has been dealing with a serious family medical problem. These incidences have led Brian to search for different options to improve his financial position. As you are aware, Brian has been trying for the past 4 months to negotiate a short sale or a compromised settlement and the process is ongoing. He did not want to finalize anything because you kept needing extensions. If you recall, first you wanted to close in early October, then you mentioned November 15th, possibly another date, and then December 10<sup>th</sup>. He also has a line of credit loan/second mortgage that he unfortunately had to max out and that needs to be dealt with. Brian is willing to grant you a 45 day extension on your option to purchase to keep you at ease. We suggest that you get an extension on your loan and we pick a mutual closing date of either January 14 or the 28th, whichever is more convenient for you. Both of us would plan for that date and be on the same page. Additionally, when you pay January rent and it's on time, Brian will give you a credit for half the rent towards the purchase price in addition to any proration, if applicable. The bottom line is that Brian really wants to sell his home to you, but is unable to commit

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Bonnie Aletaha, Cook, and North, Trial Exhibit 53.

to the date you have provided us. We hope that we can come to a

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time, we will close this deal. JPTS ¶ 42; Email correspondence between Mize and Franowicz, cc'd Hacker, Fonoimoana,

have your attorney contact me. Rest assured, if you give Brian enough

compromise that benefits both parties. Please contact me at your earliest convenience to discuss this further and/or, if you feel more comfortable.

- 53. As Franowicz testified, on or about December 21, 2012, he signed the Specific Closing Instructions from Malaga Bank to Mara Escrow in reliance on Cook and his agents' statements that escrow would close. JPTS ¶ 39; Franowicz Dec. at ¶ 28; Specific Closing Instructions from Malaga Bank to Mara Escrow, Trial Exhibit 58. The court finds this testimony to be credible.
- 54. Escrow for the Sales Contract on the Subject Property did not close in December 2012. JPTS ¶ 43.
- 55. On or about February 5, 2013, Franowicz lost his loan commitment to purchase the Subject Property from Malaga Bank because the escrow with Cook did not close. Franowicz Dec. at ¶ 31; Email Correspondence Between Al Hernan and Franowicz, and Mize and Fonoimoana, Trial Exhibit 59; Emails between Franowicz and Fonoimoana, Trial Exhibit 86.
- 56. As of February 5, 2013, Cook still had not provided a new closing date for escrow on the Sales Contract. Franowicz Dec. at ¶ 31; Email Correspondence Between Al Hernan and Franowicz, and Mize and Fonoimoana, Trial Exhibit 59; Emails between Franowicz and Fonoimoana, Trial Exhibit 86.
- 57. On or about July 17, 2013, Franowicz sued Cook in the Superior Court of California for the County of Los Angeles ("LASC") in a case entitled *Franowicz v. Cook*, LASC Case No. YC 069159 ("State Court Action"), and in the State Court Action, Franowicz alleged breach of written contract and sought specific performance of a written agreement to convey real property. JPTS ¶ 47; Complaint, Franowicz v. Cook, YC 069159, Los Angeles Superior Court, Southwest District, Trial Exhibit 92.
- 58. Cook and his wife, Victoria Velasquez Cook, filed this bankruptcy case for relief under Chapter 11 of the Bankruptcy Code on or about January 20, 2015. JPTS ¶ 48.

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Case 2:15-ap-01323-RK

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you want to rent the property and own it?

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JPTS ¶ 51; Transcript of April 10, 2015 11 U.S.C. § 341(a) Meeting of Creditors at 41:15-25, 42:1-13, 49:18-25, 50:1-8, 56: 24-25, 55:1-25, 56:1, 58:23-25, 59:1-25, 60:1-2 (emphasis added).

Hinds: Okay. So as far as the exit strategy, you don't intend to close the escrow,

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61. Both pre-petition and post-petition, Cook made no payments on the real property taxes due for the Subject Property. JPTS ¶ 55.

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62. Post-petition, Cook made no regular loan payments to Chase Bank or its successors-in-interest to WAMU for the first lien on the Subject Property. JPTS ¶ 53.

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63. Post-petition, Cook made no regular payments of dues for the Subject Property owed to the Homeowners' Association. JPTS ¶ 54.

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64. Cook never removed from title the \$100,000.00 purported lien in favor of Century West. JPTS ¶ 56; Franowicz Dec. at ¶ 41.

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65. The \$100,000 Century West Lien was ultimately removed through an adversary proceeding brought by the Chapter 7 Trustee in this bankruptcy case. See Adversary Proceeding No. 2:16-ap-01318-RK, ECF 18; JPTS ¶ 56. In the same adversary proceeding, the Chapter 7 Trustee also obtained the removal of an additional lien in the amount of

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\$309,000.00 that had been recorded against the Subject Property on or about November 7,

2013 by Century West Financial Corp. JPTS ¶ 56.

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66. On or about April 11, 2017, Plaintiffs entered into a Settlement Agreement and Release with Heide Kurtz, solely in her capacity as the Chapter 7 Trustee ("Trustee") in this bankruptcy case, pursuant to which the Trustee agreed to sell the Property to Plaintiffs. JPTS ¶ 60.

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67. On May 9, 2017, this court approved the Trustee's Motion for Order Authorizing Compromise of Controversy with Edward Franowicz and Larissa Gallagher Pursuant to Federal Rule of Bankruptcy Procedure 9019 and Authorizing Sale of Property of the Estate Pursuant to

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- 11 U.S.C. § 363, approving the Settlement Agreement and Release and approving the sale of the Property from the Estate to Plaintiffs. JPTS ¶ 61.
- 68. On July 28, 2017, Plaintiffs closed escrow for the purchase of the Subject Property, and they now hold title to the Subject Property. JPTS ¶ 63.
- 69. Plaintiffs paid \$1,303,500.00 to close escrow for the purchase of the Subject Property on July 28, 2017 and obtain title to the Subject Property. JPTS ¶ 64; Buyer's Final Settlement Statement, Trial Exhibit 289
- 70. Between March 1, 2012 and December 2012, Cook did not offer to pay any additional monetary sums so escrow could close. Franowicz Dec. at ¶¶ 32 and 52.
- 71. Between the date escrow opened and the date escrow closed, the amounts owed on the loans owed to Chase Bank and its successor-in-interest, on the dues owed the Homeowners' Association, and real estate taxes owed to the County of Los Angeles continued to increase. JPTS ¶ 62.
- 72. Cook's failure to make monthly home loan payments as of August 2012 led to an increased loan indebtedness, and as of May 2017, the Chase Bank home loan, now owned by Caliber Home Loans, had increased to approximately \$1,321,261.16. JPTS ¶ 58.
- 73. Cook's failure to make monthly dues payments to the Homeowners' Association has caused an outstanding lien on the Subject Property, and as of May 2017, the amount due on this lien was approximately \$29,224.16. JPTS ¶ 59.
- 74. As of March 1, 2012, when Cook executed the Sales Contract, Lease Agreement, and Option Agreement with Franowicz, Cook willfully withheld from Franowicz material financial data on the Subject Property in order to induce Franowicz to (1) execute the Sales Contract, (2) execute the Lease Agreement, (3) make the \$20,000.00 nonrefundable good faith "deposit" to Cook, and (4) continue from late-March 2012 to the close of escrow to pay to Cook and his bankruptcy estate \$5,000.00 per month in rent on the Subject Property. Franowicz Dec. at ¶¶ 46-55.
- 75. As Franowicz testified at trial, in regard to the sale of the Subject Property by Cook to him, Franowicz reasonably relied on the knowingly false statements made by Cook

and by his agents on his behalf to (1) continue to "push-through" with the escrow, (2) continue

Franowicz performed all conditions required of him under the terms and

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be credible.

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- conditions of the Sales Contract. Franowicz Dec. at ¶ 49.

  77. Cook failed to perform the conditions required of him under the terms and conditions of the Sales Contract, to provide clean title to the Subject Property to Franowicz and close on the escrow on the Sales Contract in December 2012. Franowicz Dec. at ¶ 52.
- 78. Cook and his agents on his behalf intentionally withheld material information on the status of the other junior liens from Franowicz at the time that the parties executed the Sales Contract, Option Agreement, and the Lease Agreement, which in part resulted in Franowicz forfeiting \$20,000.00 of his deposit to Cook through escrow as consideration for the option. Franowicz Dec. at ¶ 14, 19, 21, 34, 44, 45, 46, 47, and 53; Fonoimoana Dec. at ¶ 17.
- 79. Based on the totality of the facts, the court finds that Cook had the intention to deceive Franowicz at the time Cook signed the Sales Contract, Lease Agreement, and Option Agreement. In addition to Cook's admissions at the 11 U.S.C. § 341(a) meeting of creditors in this bankruptcy case on April 10, 2015, the court finds that the total secured debt on the Subject Property exceeded the sale price agreed upon between Cook and Franowicz set forth in the Sales Contract, which meant the amount needed to close escrow was also greater than Cook represented to Franowicz. Similarly, the court further finds that Cook failed to advise Franowicz of the need to have a "short sale" with Chase Bank, and Cook led Franowicz to believe that the sale of the Subject Property would be a standard sale as opposed to a "short sale." All these facts demonstrate that Cook did not intend to close the escrow with Franowicz in good faith.
- 80. In an effort to compel Cook to close escrow and transfer title of the Subject Property to Franowicz pursuant to the terms of the Sales Contract, Franowicz has incurred legal fees. Franowicz Dec. at ¶¶ 37, 55 and 56(A); *Plaintiffs' Legal Bills*, Trial Exhibit 82.

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- This court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C.
   \$ 1334(b). Venue is proper pursuant to 28 U.S.C.
   \$ 1409(a). This adversary proceeding is a
- core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). It is a core proceeding under 28 U.S.C.
- 25 | § 157(b)(2)(I), arising under the Bankruptcy Code, Title 11 of the United States Code, and

A. Attorney's fees and costs paid to fight the failure of Cook to honor the terms of Sales Contract, Option Agreement, and the Lease Agreement with Cook = no less than \$513,622.33 through the date of entry of the JPTS.<sup>3</sup> Plaintiffs claim to have incurred additional fees and costs since the JPTS was entered by this court and seek leave to file a final declaration setting forth the final attorney's fees and costs incurred by Plaintiffs in this matter.

Plaintiffs contend that they have sustained the following damages as a direct and

- B. Rent paid to Cook and the Chapter 7 Trustee under the terms of the Lease Agreement = \$300,000.00. *Rent Checks from Plaintiffs*, Trial Exhibit 288.
- C. The initial deposit to Cook in consideration of the option to purchase = \$20,000.

  Sales Contract, Trial Exhibit 3; Option Agreement, Trial Exhibit 4.
- D. The security deposit pursuant to the terms of the Lease Agreement = \$5,000.00.Lease Agreement, Trial Exhibit 5.
- E. Repairs made to the Subject Property during the pendency of the escrow, which repairs were the responsibility of Cook = \$1,425.75. *Repair Bills and Statements*, Trial Exhibit 290.
- F. Additional sums paid through the close of escrow to satisfy the lien claims of the primary lender, the HOA, and the County real property taxes = \$171,921.34. *Buyer's Final Settlement Statement*, Trial Exhibit 94.

# III. CONCLUSIONS OF LAW

<sup>&</sup>lt;sup>2</sup> See Plaintiffs' [Proposed] Findings of Fact and Conclusions of Law, ECF 127 at 18; Franowicz Dec. at ¶ 56; Gallagher Dec. at ¶ 37.

<sup>&</sup>lt;sup>3</sup> As evidence of the fees and costs incurred by Plaintiffs, they cite to Trial Exhibit 82, which appear to be heavily redacted and voluminous records of billing and costs which Plaintiffs describe as "Plaintiffs' Legal Bills." Trial Exhibit 82. In fact, the records are so redacted that they consist almost exclusively of black boxes with no text.

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arising in the above-referenced case under Chapter 7 of the Bankruptcy Code. This court has the constitutional authority to enter a final judgment on the complaint. *Wellness International Network, Ltd. v. Sharif*, 135 S.Ct. 1932 (2015); *Stern v. Marshall*, 564 U.S. 462 (2011).

# A. Nondischargeability of Debts under 11 U.S.C. § 523(a)(2)(A)

- 2. This is an adversary proceeding wherein Plaintiffs are seeking a determination of nondischargeability of a debt under 11 U.S.C. § 523(a)(2)(A), which states, in relevant part, that:
  - (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—
  - (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
  - (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.
- 3. The five elements, each of which the creditor must demonstrate by a preponderance of the evidence, are:
  - (1) misrepresentation, fraudulent omission or deceptive conduct by the debtor;
  - (2) knowledge of the falsity or deceptiveness of his statement or conduct;
  - (3) an intent to deceive;
  - (4) justifiable reliance by the creditor on the debtor's statement or conduct; and
  - (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct.
- Turtle Rock Meadows Homeowners Association v. Slyman (In re Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000) (citations omitted).
- 4. The party objecting to the dischargeability of a debt carries the burden of proof, and the standard of proof is a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991); *In re Slyman*, 234 F.3d at 1085; Fed. R. Bankr. P. 4005.
- 5. As a threshold issue, the court notes that the three agreements giving rise to this action—the Sales Contract, the Lease Agreement, and the Option Agreement—were

- agreements between only two parties: Defendant Cook and Plaintiff Franowicz. All the allegations in the Complaint pertain to representations and actions by Cook toward Franowicz. Plaintiff Larissa Gallagher has failed to demonstrate how she would have standing to assert the claims alleged in the Complaint since she was not a signatory to the Sales Contract. Because Plaintiff Gallagher does not have standing as a contracting party to assert these claims, the court cannot enter any judgment in Gallagher's favor.
  - i. Misrepresentation, Fraudulent Omission, or Deceptive Conduct by Debtor.
  - 6. Franowicz has established the first element of a claim under 11 U.S.C. §523(a)(2)(A) by a preponderance of the evidence because Cook represented to Franowicz that he would fully comply with the Sales Contract and Option Agreement to sell the Subject Property when he never intended to do so. Cook misrepresented to Franowicz his willingness to sell the Subject Property to Franowicz upon Franowicz's exercising of the Option Agreement:
    - Mr. Hinds: So your intention is to keep the Hermosa beach property?
- 14 Mr. Cook: Correct.
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- Mr. Hinds: Is it your understanding that escrow was supposed to close in December of that year?
  - Mr. Cook: No, because my understanding was what Ron told me, was that -- and I never want to have to sell the property, so my understanding was he he was doing something that I didn't want to be done.
- 21 Mr. Hinds: Okay.
- 22 Mr. Cook: You know what I'm saying? So that was my understanding.
- 23 Mr. Hinds: Ok, so you had no intention of selling the property—
- 24 Mr. Cook: No.
- 25 Mr. Hinds: -- and no intention of closing escrow.
- 26 Mr. Cook: I don't think so.
- 27 11 U.S.C. § 341(a) Meeting Transcript, April 10, 2015, at 42:1-13, 58:23-25, 59:1-13.

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- 7. Cook made his intentions clear at the 11 U.S.C. § 341(a) Meeting of the Creditors. Cook entered into the Sales Contract, an agreement with Franowicz, that he had no intention of ever fulfilling. Cook misrepresented to Franowicz his intention of selling the Subject Property in compliance with the Sales Contract and Option Agreement when, at the time of signing the contracts, he had no intention of ever selling the property to Franowicz.
- Further, Cook misrepresented to Franowicz his ability to sell the Subject Property for the agreed-to price of \$1.16 million as set forth in the Sales Contract that Cook executed. At the time Franowicz entered into the Sales Contract and the Lease Agreement with Cook, he was not informed that the Subject Property was encumbered by a junior lien that Cook executed in favor of Century West, the property was "underwater" (i.e., the value was less than the amount of the liens on the property) and would need an approved decisions of the appropriate lienholders for a "short" sale of the Subject Property to proceed with the sales transaction. The failure to disclose material facts constitutes a fraudulent omission under 11 U.S.C. § 523(a)(2)(A) if the debtor was under a duty to disclose and the debtor's omission was motivated by an intent to deceive. Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1246 (9th Cir. 2001); Cooke v. Howarter (In re Howarter), 95 B.R. 180, 187 (Bankr. S.D. Cal., 1989). Cook was aware of the additional liens on the Subject Property but, nevertheless, did not disclose their existence to Franowicz.
- Lastly, Cook attempted a short sale of the Subject Property with another buyer, Ben Schneider. While escrow for the Sales Contract with Franowicz was still pending, Cook entered into a Purchase and Sale Agreement of the Subject Property on or about July 12, 2012 with this other buyer, Schneider, for a purchase price of \$950,000.00. When that transaction fell through, on or about October 29, 2012, Hacker emailed Franowicz a new Residential Purchase Agreement for the Subject Property with a Short Sale Addendum. This was the first time Franowicz had been told that a short sale would be required to close escrow.
- 10. On several different occasions, Cook misrepresented to Franowicz his intention to close escrow, his ability to close escrow, and the total amount of the liens secured against the property. Cook never had any intention of closing escrow with Franowicz when he signed the

the property yet concealed this lien from Franowicz.

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# ii. Knowledge of Falsity or Deceptiveness of Statement or Conduct.

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price without a short sale. The combined secured debt was greater than the purchase price on the Sales Contract. This fact is evidenced by Cook's attempt to sell the Subject Property to another party without Franowicz's knowledge. Cook and his team had secretly been negotiating with that third party to purchase the Subject Property for \$950,000. This was

Cook knew the Subject Property could not be sold to Franowicz for the purchase

completely inconsistent with the agreement to sell the property to Franowicz in the Sales

Contract. In addition, the term "actual fraud" in 11 U.S.C. § 523(a)(2)(A) encompasses forms of

fraud, like fraudulent conveyance schemes, that can be affected without a false representation. 11

Husky International Electronics, Inc. v. Ritz, 136 S.Ct. 1581, 1586 (2016).

- 12. Cook was aware of the Century West lien and did not disclose this lien to Franowicz. Only after multiple faulty preliminary title reports were obtained on the Subject Property did Cook inform Franowicz that there was an outstanding lien secured against the Subject Property that required the execution of a short sale. At no time prior to the execution of the Sales Contract did Cook or his sales team advise Franowicz that the sale of the Subject Property would require a short sale. As Franowicz testified, he would not have entered into an agreement with Cook to buy the Subject Property had he been aware of the encumbrances on the property, but he was induced into such a deal by Cook's failure to disclose material information.
- Cook knew that he would not and was not able to sell the Subject Property to Franowicz because Cook knew the total amount of liens on the Subject Property exceeded the purchase price in the Sales Contract. This is evidence that Cook had no intention of selling the Subject Property to Franowicz because Cook knew that he could not have closed escrow on the Subject Property without effectuating a short sale.

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- 14. There was a pattern pre-execution and post-execution of the Sales Contract with Franowicz that clearly demonstrates that Cook never intended to sell the property to Franowicz. As discussed above, at the 11 U.S.C. § 341(a) meeting of creditors Cook twice admitted that he had no intention of selling the Subject Property to Franowicz.
- 15. From the start, Cook never intended to sell the Subject Property to Franowicz. Cook entered into an agreement with Franowicz with no intention of ever following through with the agreement.
- Cook's attempt at a short sale of the Subject Property to another buyer demonstrates Cook's intent to deceive. After entering into a contract to sell the Subject Property to Franowicz, Cook continued his efforts to sell the property to any buyer he could find. Without Franowicz's consent, Cook and his team were secretly seeking to convince Chase Bank to approve a short sale on the Subject Property to another buyer.

# iv. Justifiable Reliance by Creditor on Debtor's Statement or Conduct.

- 17. The reliance upon the debtor's false representation must be justifiable. Field v. Mans, 516 U.S. 59, 73-75 (1995) (establishing 11 U.S.C. § 523(a)(2)(A) requires justifiable reliance rather than the former standard of reasonable reliance); In re Kirsh, 973 F.2d 1454, 1460 (9th Cir. 1992) (adopting "justifiable reliance" as the applicable standard of reliance).
- 18. Franowicz's actions were taken based on his reliance on Cook's intent to fulfill his part of the agreement with Franowicz in the Sales Contract. As part of that agreement, Franowicz paid \$11,166.62 to Cook in furtherance of the Lease Agreement which constituted first month's rent, last month's rent, and the security deposit. Franowicz then took possession of the Subject Property on or around March 25, 2012, with rental payments made payable to Cook/Bag Fund. On April 16, 2012, pursuant to the Option Agreement, Franowicz deposited \$34,800 into escrow in an attempt to close the sale with \$20,000 of that sum going directly to Cook.
- 19. When Franowicz entered into the original Sales Contract, Option Agreement, and the Lease Agreement with Cook, he relied on the first preliminary title report conducted on

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- November 29, 2011. This report did not disclose the Century West lien. In his trial declaration, Franowicz testified that he would not have entered into any agreement with Cook had he been aware of this outstanding lien on the Subject Property. This court finds this testimony to be credible.
- 20. Franowicz obtained a home loan from Malaga Bank based on a purchase price of \$1.16 million. On or about December 21, 2012, Franowicz signed the Specific Closing Instructions from Malaga Bank to Mara Escrow in reliance on Cook's and his agent's statements that escrow would close. When escrow did not close in December or January of the next year, Franowicz lost his loan commitment from the bank.
- 21. Overall, Franowicz did not have any reason to suspect that Cook would provide three defective title reports for the Subject Property, had never intended to sell the Subject Property to him, or would drag out escrow process causing Franowicz's loan commitment to lapse. As a result, there was justifiable reliance by Franowicz on representations made to him by Cook.

# v. Damage to Creditor Proximately Caused by Reliance on Debtor's Statement.

- 22. Franowicz has suffered damages as a result of Cook's conduct. Cook's stalling of closing while in escrow caused Franowicz's loan with Malaga Bank to lapse. On or about February 5, 2013, Franowicz lost his loan commitment from Malaga Bank because the escrow with Cook did not close.
- 23. It took five years and the appointment of the Chapter 7 trustee to complete the sale of the Subject Property to Franowicz. When escrow did finally close, Franowicz paid \$1,303,500.00 on July 28, 2017, to obtain title to the Property instead of the agreed to price of \$1.16 million. The difference in the sales price was \$171,921.34, apparently due to increased indebtedness from the home loan secured by a first lien on the Subject Property, homeowners' association dues for the Subject Property and real property taxes on the Subject Property. During this time, Franowicz also continued to pay Cook \$5,000 per month in rent while living on the Subject Property pursuant to the Lease Agreement.

- 24. Cook's failure to make monthly home loan payments on the Subject Property as of August 2012 led to an increased loan indebtedness on the Subject Property. As of May 2017, the WAMU home loan secured by a first lien, now owned by Caliber Home Loans, had increased to approximately \$1,321,261.16.
- 25. As of May 2017, the amount of the Homeowners' Association lien for unpaid dues on the Subject Property was \$29,224.16.
- 26. Therefore, the court finds that Franowicz has proven his claim under 11 U.S.C. § 523(a)(2)(A) by a preponderance of the evidence, that Franowicz was damaged in the amounts set forth in paragraph 81(B)-(F) of the findings of fact set forth above (as discussed herein, the court reserves ruling on Franowicz's claim for damages for attorney's fees incurred by him in his litigation against Cook in paragraph 81(A) of the findings of fact above), that Cook is indebted to Franowicz in such amounts and that these debts owed by Cook to Franowicz are excepted from discharge. As discussed above, because Plaintiff Larissa Gallagher has no standing to assert a claim under 11 U.S.C. § 523(a)(2)(A), the court cannot enter judgment in Gallagher's favor.

# B. Entitlement to Attorney's Fees

- 27. Ordinarily, under the American Rule, a prevailing party may not recover attorney's fees except as provided for by contract or by statute. *In re Hosseini*, 504 B.R. 558, 567 (9th Cir. BAP 2014) (citations omitted). No general right to recover attorney's fees exists under the Bankruptcy Code. *Id.* at 568 (citation omitted). Nothing in 11 U.S.C. § 523(a)(2)(A) allows the prevailing party to recover attorney's fees. However, this general rule can be overcome by statute or by an "enforceable contract" allocating attorney's fees. *In re Carey*, 446 B.R. 384, 391 (9th Cir. BAP 2011) (citations omitted).
- 28. With regard to a request by a prevailing creditor for attorney's fees, attorney's fees form a part of a bankruptcy claim and can be nondischargeable where the creditor has a contractual right to them valid under state law. *Jordan v. Southeast National Bank (In re Jordan)*, 927 F.2d 221, 226-227 (5th Cir. 1991), overruled on other grounds, Coston v. Bank of *Malvern (In re Coston)*, 991 F.2d 257 (5th Cir. 1993); accord, Schwertner Backhoe Services,

- 29. The courts in the Ninth Circuit have consistently held that California Civil Code § 1717 only applies to an action on a contract. *Redwood Theaters, Inc. v. Davison (In re Davison)*, 289 B.R. 716, 724 (9th Cir. BAP 2003) (holding that California Civil Code § 1717 is not applicable because the only claim asserted was a nondischargeability claim based on fraud); *Terra Nova Industries, Inc., Inc. v. Chen (In re Chen)*, 345 B.R. 197, 201 (N.D. Cal. 2006) (holding that the bankruptcy court did not err in declining to award attorney's fees under California Civil Code § 1717 because the court did not make any determination as to the contract claim, nor did it rely on the contract in its ruling on the dischargeability claim). Because the court is not making a ruling "on the contract," California Civil Code § 1717 does not apply here.
- 30. California Code of Civil Procedure § 1021 provides: "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided." California Code of Civil Procedure § 1021 does not limit the recovery of attorney's fees to certain claims. *In re Davison*, 289 B.R. at 724. Attorney's fees may be recoverable under California Code of Civil Procedure § 1021, even though they are not recoverable under California Civil Code § 1717. *Id.* Therefore, "California law permits recovery of attorney's fees by agreement, for tort as well as contract actions." *Id.* California Code of Civil Procedure § 1032 allows for the prevailing party to "recover costs" "when authorized by. . . Contract . . . . " *In re Davis*, BAP No. CC-18-1326-FLKu, 2019 WL 2931668 at \*8 (9th Cir. BAP 2019). In particular, California Code of Civil Procedure § 1021 permits recovery of attorney's fees in cases under 11 U.S.C. § 523. *Id.*

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- 31. Pursuant to these provisions, "[p]arties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract." *MRW, Inc. v. Big-O Tires, LLC*, 684 F.Supp.2d 1197, 1201 (E.D. Cal. 2010) (citing California Code of Civil Procedure §§ 1021 and 1032(b) and *Santisas v. Goodin,* 17 Cal.4th 599, 608 (1998)). All three of the contractual agreements signed by Cook and Franowicz—the Sales Contract, the Option Agreement, and the Lease Agreement—have provisions for recovery of attorney's fees for any claim arising out of the contract. The underlying action for this case is an action in tort law. As discussed above, the courts in the Ninth Circuit have held that even if an action is not specifically on the contract, the prevailing party may recover attorney's fees for an underlying tort action.
  - a. The attorney's fees provision in the Sales Contract provides: "In any action, proceeding, or arbitration between Buyer [Franowicz] and Seller [Cook] arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to reasonably attorney fees and costs from the non-prevailing Buyer or Seller, except as provided in paragraph 26A [regarding mediation]." *Sales Contract* at ¶ 21, Trial Exhibit 3.
  - b. The attorney's fees provision in the Option Agreement provides: "In any action, proceeding, or arbitration between Optionee [Franowicz] and Optionor [Cook] arising out of this Option, the prevailing Optionee or Optionor shall be entitled to reasonably attorney fees and costs from the non-prevailing Optionee or Optionor."

    Option Agreement at ¶ 14, Trial Exhibit 4.
  - c. The attorney's fees provision in the Lease Agreement provides: "In any action or proceeding arising out of this Agreement, the prevailing party between Landlord [Cook] and Tenant [Franowicz] shall be entitled to reasonably attorney fees and costs, except as provided in paragraph 39A [regarding mediation]." *Lease Agreement* at ¶ 40, Trial Exhibit 5.
- 32. The court finds that the language contained in all three attorney's fees provisions is sufficiently broad to encompass the present action under 11 U.S.C. § 523(a)(2)(A). See In re Davis, 595 B.R. 818, 832-835 (Bankr. C.D. Cal. 2019), affirmed, BAP No. CC-18-1326-FLKu,

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2019 WL 2931668 (9th Cir. BAP 2019) (collecting cases and concluding that attorney's fees provision that applied to actions "arising out of this agreement" applied to a fraud claim under 11 U.S.C. § 523(a)(2)(A)).

- 33. Because three valid contracts exist between Franowicz and Cook, all of which contain attorney's fees provisions that apply to this action, and applicable case law has held that these provisions are applicable in tort actions, the court determines that Franowicz is probably entitled to recover reasonable attorney's fees and costs if he brings a proper motion as discussed herein.
- 34. Based upon the foregoing, this court finds that Defendant, Brian Cook, made false representations because he had no intention of fulfilling his obligations under the Option Agreement and Sales Contract. Further, by failing to disclose to Franowicz material information on the liens against the Subject Property, by failing to provide Franowicz with information on the status of title for the Subject Property, and by seeking to sell and/or lease the Subject Property to a third party while the Subject Property was under contract of sale with Franowicz, Cook committed fraud under 11 U.S.C. § 523(a)(2)(A). Cook perpetrated this fraud on Franowicz through his agents, North, Hacker, and Mize. Cook knew of material information on the liens against the Subject Property yet willfully withheld this information from Franowicz.
- 35. Based upon the foregoing, the court finds that Franowicz is entitled to judgment on his claim under 11 U.S.C. § 523(a)(2)(A) that Cook is indebted to him in the amount of \$498,347.09, plus reasonable attorney's fees and costs to be determined upon a proper motion, which debts are excepted from discharge, comprised as follows:
  - A. Rent paid to Cook and the Chapter 7 Trustee under the terms of the Lease Agreement = \$300,000.00. Rent Checks from Plaintiffs, Trial Exhibit 288.
  - B. The initial deposit to Cook in consideration of the option to purchase = \$20,000. Sales Contract, Trial Exhibit 3; Option Agreement, Trial Exhibit 4.
  - C. The security deposit paid to Cook and never returned pursuant to the terms of the Lease Agreement = \$5,000.00. *Lease* Agreement, Trial Exhibit 5.

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- D. Repairs made to the Subject Property during the pendency of the escrow, which repairs were the responsibility of Cook as seller = \$1,425.75. *Repair Bills and Statements*, Trial Exhibit 290.
- E. Additional sums that Franowicz had to pay to finally purchase the Subject Property from the Chapter 7 Trustee which were paid through the close of escrow apparently to satisfy the lien claims of the primary lender for the home loan secured by the first lien, the Homeowners Association for dues, and the County of Los Angeles for real property taxes = \$171,921.34. See Buyer's Final Settlement Statement, Trial Exhibit 94.
- F. As discussed above, Franowicz is also probably entitled to reasonable attorney's fees and costs pursuant to the attorney's fees provisions in the Sales Contract, Option Agreement, and the Lease Agreement. However, Franowicz has failed to provide the court with evidence of reasonable fees and costs incurred in litigating his claims arising out of these agreements. Franowicz provided only heavily redacted and voluminous records of billing and costs which Franowicz describes as "Plaintiffs" Legal Bills." Trial Exhibit 82. However, the records are so redacted that they consist almost exclusively of blacked out boxes with no text describing the services performed or costs incurred, which records do not enable the court to determine the reasonableness of the attorney's fees and costs incurred by Franowicz which he claims as damages. With no basis on which to determine what amount of fees and costs are reasonable, the court cannot enter judgment regarding such amounts. Accordingly, within 60 days after the date of entry of these findings of fact and conclusions of law, Franowicz must file a motion for an award of attorney's fees supported by unredacted billing statements and invoices supported by a declaration under penalty of perjury setting forth the fees and costs reasonably incurred in this action.
- 36. After the court has completed its review of the motion for reasonable attorney's fees and costs incurred by Franowicz, if such a motion is filed, or after the 60-day deadline for filing

such a motion has expired, and no such motion is filed, the court will enter a final judgment 2 consistent with these findings of fact and conclusions of law. As discussed above, the three contractual agreements giving rise to this action and containing the attorney's fees provisions— 3 the Sales Contract, the Lease Agreement, and the Option Agreement—were agreements between only Defendant Cook and Plaintiff Franowicz. Cook's representations and actions giving rise to a claim under 11 U.S.C. § 523(a)(2)(A) were directed only toward Franowicz. 6 Only Plaintiff Franowicz, and not Plaintiff Larissa Gallagher, was a signatory to the agreements 7 containing the attorney's fees provisions. Because Plaintiff Gallagher has no standing to assert a claim under 11 U.S.C. § 523(a)(2)(A) or to assert an entitlement to attorney's fees, the court 10 cannot enter judgment in Gallagher's favor. 11 IT IS SO ORDERED. 12 ### 13 14 15 16 17 18 19 20 21 22 23 24 Date: August 9, 2019 Robert Kwan 25 United States Bankruptcy Judge 26 27 28

Doc 128 Filed 08/09/19

Page 30 of 30

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